

PUBLIC PROSECUTOR v. MAT NAWI BIN ISMAIL

[A.Cr.J. (K.C. Vohrah J.) October 11, 1986]

[Kota Bharu — Criminal Appeal No. 29 of 1985]

Customs and Excise — Customs-barrier — Failure to stop at — Order for release of car — Duty on goods found in car already paid — Whether car should be forfeited — Customs Act 1967, ss. 111A(2), 114, 126 & 127(1).

The respondent, the driver of car DG 899 Model Datsun 220C, was convicted and fined for failing "to comply to the signal of the proper officer of Customs and signboard ... requiring the said vehicle ... to stop for customs examination ... an offence under section 111A(2) of the Customs Act 1967 and punishable under the same Act." The car was abandoned after a chase. Goods were found in the car. They were suspected to be dutiable and therefore the car was lawfully seized. But the goods were subsequently released upon proof that duty had been paid. The car DG 899 which the respondent used at the time of the commission of the offence was ordered to be returned to the respondent.

The Public Prosecutor appealed against the Magistrate's order returning the car.

Held: (1) no offence having been committed in respect of the said goods, the car should have been released;

(2) no question of forfeiture arises under section 127 of the Act and the order of the Magistrate returning the car to the respondent is confirmed.

Case referred to:

(1) *Reg. v. Ng Hee Weng* [1956] M.L.J. 85.

CRIMINAL APPEAL.

Ahmad bin Haji Maarop (Deputy Public Prosecutor) for the appellant.

Apandi bin Ali for the respondent.

Cur. Adv. Vult.

K.C. Vohrah J.: In the Tumpat Magistrate's Court the respondent pleaded guilty to the following charge:

"That you, Mat Nawi bin Ismail, I/C No. 674564 of 1292, Kg. Telaga Bata, Tumpat, Kelantan, at about 8.30 a.m. at Pasir Pekan, in the District of Tumpat, in the State of Kelantan, being the driver of car, to wit, registration number DG 899 Model Datsun 220C, coming from the direction of Wakaf Bahru towards, Kota Bharu, arriving at a Customs Road-Block erected at the ex-Toll House, Pasir Pekan, Tumpat, did fail to comply to the signal of the proper officer of Customs and signboard, to wit, BERHENTI PEMERIKSAAN KASTAM, requiring the said vehicle registration number DG 899 to stop for customs examination and you have thereby committed an offence under

A section 111A(2) of the Customs Act 1967 and punishable under the same Act."

B The respondent was convicted and fined \$250 in default 1 month's imprisonment. The car DG 899 which the respondent used at the time of the commission of the offence was ordered to be returned to the respondent.

C The Public Prosecutor has appealed against the magistrate's order returning the car. The contention is that the forfeiture provision of section 127 of the Customs Act 1967 (the Act) is mandatory and that the car should have been forfeited.

D The relevant facts adduced by the prosecution and admitted to by the respondent showed that on March 12, 1985, he drove the said car. When he failed to stop the car at the customs road-barrier as required to do so by a signal from a customs officer, the customs chased the car until the respondent abandoned the car at a *cul-de-sac* and ran away. Dutiable goods were found in the car. The same morning, however, the respondent surrendered himself to the Customs. According to the Customs the respondent claimed that he was transporting the goods found in the car to a third person; he had disregarded the customs road-barrier because he had thought that duty had not been paid on those goods. But on April 7, 1985, he produced receipts indicating that the payment of duties had been made on the goods. The customs then released the goods to him. The car was, however, detained.

The question is, was the magistrate right in not ordering the forfeiture of the car?

G It was argued by Encik Ahmad bin Hj. Maarop, Deputy Public Prosecutor, that since the driver had failed to stop the car in compliance with the signal of a proper officer of customs at the customs barrier, the car had been used in the commission of an offence under section 111A; the car fell within the second limb of the forfeiture provision in section 127(1) of the Act and had to be forfeited.

H Encik Apandi bin Ali for the respondent, however, argued that there could only be a forfeiture under the second limb of section 127(1) if, as section 126 and the opening words of section 127 indicate, the car was, in the first place, liable to seizure. He submitted that the car was not liable to seizure as the seizure provision of the Act under section 114 did not contemplate the seizure of a car for an offence under section 111A.

Section 111A of the Act does not contain any provision for the seizure of a vehicle of a person who does not stop the vehicle. One therefore has to look at section 114 whether it may be seized.

It will be noted that the seizure provision in section 114 and the forfeiture provision in section 127 of the Act correspond with the provisions in sections 110 and 123 respectively of the Customs Ordinance 1952 (which the Act replaced). These sections 110 and 123 were the subject matter of judicial interpretation in 1956 by the Court of Appeal in the case of *Reg. v. Ng Hee Weng & Ors.*⁽¹⁾

In that case Good J. held that where a vehicle used in the commission of an offence had been seized by a customs officer under section 110 of the Customs Ordinance 1952 and if it was proved to the satisfaction of the Court that the vehicle had been so used, section 123 of the Ordinance gave no discretion to the Court, but rendered an order for forfeiture mandatory.

It will be noted that the Court observed that the said section 110(1) enumerated the things that were liable to seizure and this the subsection did by setting them cumulatively in two categories as:

- (a) goods which were the subject matter of the offence; and
- (b) goods which were used in the commission of the offence.

Then the forfeiture provision of section 123 (section 127 of the Act) would come into operation. The section provided for the disposal of the two categories of things which were seizable under section 110(1). And forfeiture had to be ordered if they were proved to the satisfaction of the Court to fall into either category.

Good J. in explaining the nature of the goods which fell either in category (a) or (b) said that the goods in category (a) were goods referred to in the first part of section 110(1) (presently, section 114(1) of the Act), *i.e.*, "goods in respect of which there has been, or there is, reasonable cause to suspect that there has been committed any offence against this Ordinance or regulation made thereunder, or any breach of the provisions of this Ordinance or of any regulation made thereunder or of any restriction or condition subject to or upon which any licence or permit has been granted."

A Good J. added that "that the goods in category (b) are the receptacles, packages, conveyances, vessels and aircraft mentioned in the second part of section 110(1) *i.e.* those in which the goods first mentioned may have been found, or which have been used in connection with such offence or breach." (Emphasis mine).

B This explanation of Good J. as regards the nature of the goods in category (a) or (b) which may be seized under section 110(1) of the Customs Ordinance 1952 is certainly applicable to the interpretation of the corresponding section 114 of the Customs Act 1967.

C Thus, it seems clear that if a conveyance is not the subject matter of an offence under the Customs Act under category (a), it can only fall under category (b), within the context of section 114(1) of the Act, if there can be established that there is a nexus between such conveyance and goods which are the subject matter of an offence under category (a). Whether such goods in category (a) are seized or not, if the conveyance had within it such goods, or if the conveyance had been used in connection with such goods, the conveyance may be seized. There being such a nexus the conveyance can be considered properly seized. Only then would the forfeiture provision of section 127 come into play.

D E F It will be noted, however, that a person who commits an offence under section 111A(1) of the Act for failing to stop does not commit an offence in relation to goods. If he fails to stop, he may be apprehended by a proper officer of customs. On the other hand, if he fails to stop the vehicle he is in, the vehicle may only be stopped by a proper officer of customs and that is as far as section 111A(1) allows a proper officer of customs to go in respect of the car. There is no power of seizure of the vehicle.

G H However if there are goods in the car, the power to seize the vehicle under section 114(1) may arise. This power would only arise if there is reasonable cause to suspect that in respect of these goods there has been committed an offence against the Act or any regulations made thereunder.

I In the present case the car was abandoned after a chase. Goods were found in the car. And they were reasonably suspected to be dutiable and therefore the car was lawfully seized. But the goods were subsequently released upon proof that duty had been paid on them. No offence having

been committed in respect of these goods, the car should then have been released. No question of forfeiture arises under section 127 of the Act in the circumstances. I accordingly confirm the order of the magistrate returning the car to the respondent.

Order accordingly.

Solicitors: *Yusof & Apandi.*

PUBLIC PROSECUTOR v. MOHAMMAD ABDULLAH ANG SWEE KANG

[O. Cr. J. (N.H. Chan J.) December 15, 1986]

[Kuala Lumpur — Selangor Criminal Trial No. 59-1-1986]

Criminal Law and Procedure — Sentence — Criminal breach of trust by managing director of Company — Plea of guilty — Penal Code, s. 409.

In this case the accused had pleaded guilty to a charge of criminal breach of trust by an agent acting as such. The accused was the managing director of the Malayan Overseas Investment Corporation (MOIC), a joint-venture company formed to co-operate with each other for the purpose of investing overseas. One of the parties to the joint venture was MAA Holdings Sdn Bhd (MAA) which owned 13.4% of the equity of MOIC. The accused and his wife owned shares in MAA amounting to one-third of its equity. MAA also held 20% of the equity in Narspro Sdn. Bhd, (NARSPRO) a joint venture company to establish rubber manufacturing factories. NARSPRO had ordered machinery from Taiwan costing US\$220,000. They had paid a deposit of US\$66,000 and they needed to open letters of credit for the balance. However NARSPRO did not have the financial means nor credit facilities to do so. The accused then agreed to authorise MOIC's bankers to open letters of credit in the name of MOIC for the benefit of NARSPRO. When the machinery arrived in Penang, NARSPRO did not have the money. The letters of credit had been opened in the name of MOIC and the accused instructed a sum of \$338,808.80 to be paid by the bankers of MOIC. The payment was not made for the benefit of MOIC and it was made without the knowledge or approval of the Board of Directors of MOIC. The amount of \$338,808.80 together with bank interest had since been repaid to MOIC by NARSPRO.

Held: (1) any judge who comes to sentence in a breach of trust case ought always to apply the two factors which operate in this type of case: the retributive factor in order to show the court's disapproval or abhorrence on behalf of the community, of this type of criminal conduct, and the deterrent factor so as to discourage likely offenders;

(2) in breach of trust cases a term of immediate imprisonment is inevitable save in any exceptional circumstances or where the amount of money obtained is small. The sentencing court should impose a sufficiently substantial

A term of imprisonment to mark publicly the gravity of the offence;

(3) in this case after considering all the matters in the case and after having given the appropriate discount for the plea of guilty the court sentenced the accused to eight years' imprisonment plus a fine of \$100,000 in default a further 6 months' imprisonment.

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[Editorial Note: On appeal to the Supreme Court (May 18, 1987) the jail sentence was reduced to 4 years, and the fine imposed on the accused was set aside.]

Cases referred to:

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- (1) *Reg. v. Davies* (1978) 67 Cr. App. R. 207, 210.
- (2) *Reg. v. Sargeant* (1974) 60 Cr. App. R. 74, 77.
- (3) *Reg. v. Barrick* (1985) 81 Cr. App. R. 78, 81-82.
- (4) *Reg. v. Pugh and Rendell* [1981] Cr. L.R. 270, 271.
- (5) *Public Prosecutor v. Khairuddin* [1982] 1 M.L.J. 331, 332.

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- (6) *Public Prosecutor v. Muthu Lingam* [1986] 1 M.L.J. 432.

CRIMINAL TRIAL.

Mohtar Abdullah (Deputy Public Prosecutor) (*Tan Hock Chuan* (Deputy Public Prosecutor) with him) for the Public Prosecutor.

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Jeffrey Fernandez (*Dulip Singh* with him) for the accused.

Cur. Adv. Vult.

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N.H. Chan J.: What is the right sentencing policy for criminal breach of trust? "A good deal depends upon the concept of what is necessary. There are of course the classical considerations relevant to all sentences: retribution, deterrence, prevention and rehabilitation. In our judgment two of those factors operate in a case of this kind." - said Lawton L.J.

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in the Court of Appeal in *Reg. v. Davies*.⁽¹⁾ The two factors which operate in this class of case are retribution and deterrence. In *Davies* it was held that where a solicitor in breach of trust uses clients' money to bolster-up other business interests, in considering the appropriate sentence, both the retributive and deterrent elements have to be considered.

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The retributive element is an important one in this class of case. "At one time it was fashionable to suggest that retribution ought not to enter into sentencing policy. That opinion I think, is not held as strongly now as it was a few years ago. The reason is manifest: the courts have to make it clear that crime does not pay and the only way they can do so is by the length of sentences. Sentences show the court's disapproval, on behalf of the community, of particular types of criminal conduct." — by

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